

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

RAYMOND F. GREGORY
Attorney for Defendants-Appellees
630 Fifth Avenue
New York, New York 10020
757-5750

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7286

MIRIAM CIVEN,

Plaintiff-Appellant,

--against--

COUNTRYWIDE REALTY, INC.,
ABRAHAM KAPLAN, MORRIS KARP,
CHARLES KORMAN, ELMER L.
LITWIN, LEONARD NEWMAN, ARTHUR
PURO, JEROME DEUTSCH and REALTY
EQUITIES CORPORATION OF NEW YORK,

Defendant-Appellees.

Appeal from the United States District Court for the
Southern District of New York

Brief for Defendants-Appellees

The Issue Presented

The sole issue for review is whether the findings of
fact of the District Court were clearly erroneous?

STATEMENT OF THE CASE

Nature of the Case

This is a stockholder's action, allegedly arising under Sections 9, 10, 14 and 18 of the Securities Exchange Act of 1934 and Sections 12 and 17 of the Securities Act of 1933 against Countrywide Realty Inc. ("Countrywide"), certain of its officers and directors and Realty Equities Corporation of New York ("Realty Equities"). At the trial plaintiff ventured to prove that certain proxy materials distributed to stockholders of Countrywide failed to disclose material facts concerning a proposed exchange of Countrywide shares of common stock for those of Realty Equities.

Disposition of the Court Below

After a trial without a jury, Hon. Richard Owen held that plaintiff failed to prove the allegations of the complaint and the complaint was therefore dismissed. Judgment was entered in favor of Countrywide and Elmer L. Litwin*.

*The other named defendants have not been served with process.

STATEMENT OF FACTS

Plaintiff alleged that a proxy statement mailed to Countrywide stockholders in September 1967 omitted to state that certain derivative stockholders' actions brought for the benefit of Countrywide were about to be settled, and upon settlement, Countrywide's net worth would have been materially increased. Countrywide mailed the allegedly defective proxy statement on September 13, 1967 for its annual meeting scheduled for October 18, 1967. The proxy statement recommended that Countrywide's shareholders approve a plan of reorganization pursuant to which the assets of Countrywide would be transferred to a subsidiary of Realty Equities Corporation of New York in exchange for Realty Equities common stock, which would then be distributed to Countrywide's shareholders in exchange for their Countrywide stock.

Plaintiff alleges that the proxy statement failed to disclose that the derivative actions brought on Countrywide's behalf had been settled and that the settlement was a material benefit to Countrywide, which should have been disclosed in the proxy statement.

At the trial, defendants offered evidence showing that the settlement could not have been disclosed in the proxy

statement because a report by a Referee appointed by the Supreme Court, New York County, recommending approval of the settlement was not issued until September 28, 1967. No hearing was held by the Supreme Court on the settlement until November 14, 1967 and the settlement was not approved by the Court until March 12, 1968. Defendants also offered testimony demonstrating that the settlement of the derivative actions was of no material benefit to Countrywide.

POINT I

The Findings of Fact of the District Court Were not Clearly Erroneous

As stated by Judge Owen in his opinion and decision, "plaintiff Civen offered utterly no proof whatever on the issues raised by the allegations of her complaint". Nevertheless, at the conclusion of plaintiff's case in chief, Judge Owen reserved decision on defendants' motion to dismiss and directed defendants to offer their proofs in defense of their action. Thereupon, defendants showed that the proxy materials properly disclosed the status of the derivative actions. In addition, defendants established that even if the settlement of the derivative actions had been finalized before the materials were mailed to the Countrywide stockholders,

knowledge of the settlement was not material and would not have affected a reasonable stockholder in his decision to vote for or against the proposed exchange of Countrywide and Realty Equities stock. Plaintiff failed to offer any evidence in rebuttal.

Where a trial without a jury involves disputed factual issues, the findings of fact by the trial court should not be set aside unless clearly erroneous, and they are not clearly erroneous unless on the entire record the reviewing court is left with a definite and firm conviction that a mistake has been committed. C.I.R. v. Duberstein, 363 U.S. 278 (1960); McAllister v. United States, 348 U.S. 19 (1954); Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2nd Cir. 1969).

In light of plaintiff's failure to offer any evidence in support of the allegations of her complaint, she cannot now claim that the findings of fact of the District Court were erroneous.

CONCLUSION

The decision and order of the District Court should be affirmed.

Respectfully submitted,

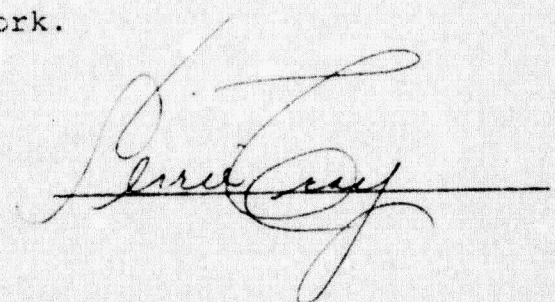
RAYMOND F. GREGORY
Attorney for Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

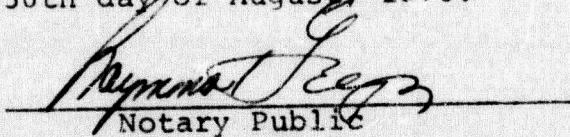
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

PERRIE GRAY, being duly sworn, deposes and says:
Deponent is not a party to the action, is over 18 years of age
and resides at Lakewood, New Jersey.

On August 30, 1976 deponent served the within Brief for
Defendants-Appellees upon Miriam Civen, plaintiff-appellant pro
se in this action at 46 Cohituate Road - Apt. 506, Framingham,
Mass. 01717, the address designated by plaintiff-appellant for
that purpose by depositing a true copy of same enclosed in a
post-p properly addressed wrapper in an official depository
under exclusive care and custody of the Unit 1 States Postal
Service within the State of New York.



Sworn to before me this
30th day of August, 1976.


Notary Public

RAYMOND F. GREGORY
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-1556275
Qualified in Kings County
Term Expires March 30, 1977

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

- ☐ Certification
By Attorney
- ☐ Attorney's
Affirmation

certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

shows: deponent is

the attorney(s) of record for
in the within action; deponent has read the foregoing
and knows the contents thereof; the same is
true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief,
and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

Check Applicable Box

- ☐ Individual
Verification
- ☐ Corporate
Verification

the
the foregoing
deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters deponent believes it to be true.

the
a
foregoing
is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and
belief, and as to those matters deponent believes it to be true. This verification is made by deponent because
is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on

19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

Check Applicable Box

- ☐ Affidavit
of Service
By Mail
- ☐ Affidavit
of Personal
Service

On 19 deponent served the within
upon
attorney(s) for

in this action, at
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

On 19 at
deponent served the within upon

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir: Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the within
named court on 19

Dated,

Yours, etc.,

RAYMOND F. GREGORY

Attorney for

Office and Post Office Address

To

Attorney(s) for

===== NOTICE OF SETTLEMENT =====

Sir:—Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

RAYMOND F. GREGORY

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. 76-7286

Year 19

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FOR THE SECOND CIRCUIT

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COUNTRYWIDE REALTY, INC.,
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Defendants-Appellees.

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AFFIDAVIT OF SERVICE BY MAIL

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RAYMOND F. GREGORY

Attorney for Defendants-Appellees

Office and Post Office Address, Telephone

630 Fifth Avenue

New York, New York 10020

757-5750

=====

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for